No. 17-250

In the
Supreme Court of the United States

MITCHELL J. STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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"The principle that a State may not knowingly use false evidence … to obtain a tainted conviction" is "implicit in any concept of ordered liberty," *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The Constitution thus "impose[s] upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath," *California v. Trombetta*, 467 U.S. 479, 485 (1984). While it would seem self-evident that this duty is not excused just because the defendant has received documents that contradict the testimony, the circuits and state supreme courts nevertheless are sharply divided on this critical question.

The government claims to find no such division, insisting that all courts of appeals that have "directly addressed this issue have held that, absent certain extenuating circumstances, '[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object.'" BIO.18 (quoting App.19). That is demonstrably incorrect. The Eighth and Ninth Circuits (and two state supreme courts) have made plain that defense counsel's knowledge of a falsehood and failure to object are "of no consequence" when assessing whether the government has met its duty to correct false testimony. These holdings are correct and irreconcilable with the decision below.

The government attempts to manufacture vehicle problems by misconstruing the decision and record below. Lifting one phrase from one sentence of the Eleventh Circuit's introduction, the government

claims that petitioner "failed to identify any materially false testimony." BIO.I, 14. What the court actually held, however, was quite different: that, even though Stein identified "allegedly false testimony" (App.26), and that testimony was "material," App.26 n.13, there was no "violation of *Giglio*," App.2-3, because the government did not "capitalize" on the testimony or suppress evidence showing that it was false. App.25-26. The question whether that rule comports with due process is squarely presented here.

The government next asserts that its two leading witnesses did not testify falsely. But rather than defend their testimony as given—testimony that was directly contradicted by documentary evidence—the government speculates as to what the witnesses might have meant and how their reimagined testimony could be squared with the facts. Such speculation is irrelevant. The witnesses' *actual* testimony was false, the government knew it, and the Eleventh Circuit allowed the conviction to stand solely because Stein also may have known the testimony was false. This Court should decide now whether such sharp tactics from prosecutors can be reconciled with due process.

I. This Case Involves A Deep And Persistent Split Among The Circuits And State Courts Of Last Resort.

There is a recognized split among the circuits and state supreme courts on the question whether "[t]he principle that a State may not knowingly use false evidence … to obtain a tainted conviction" is rendered inapplicable when the defendant has knowledge that the evidence is false. *Napue*, 360 U.S. at 269. The government nevertheless asserts that "the courts of

appeals that have directly addressed the issue have held that, absent certain extenuating circumstances, '[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object.'" BIO.18 (quoting App.19). The government cannot wish away a circuit split. Both the Eighth and Ninth Circuits have directly addressed the issue and held the opposite, as have two state supreme courts. *See* Pet.17-22.

The government tries to skirt these holdings by identifying "extenuating or other distinguishing circumstances" that might explain why the courts "granted relief on false testimony claims despite the defense's knowledge of the falsehood." BIO.22. But even a cursory review of these decisions reveals that they turned on the prosecution's mere use of false testimony, not the superficial "circumstances" identified by the government. For example, in *United States v. Foster*, though defense counsel knew that prosecution witnesses gave false testimony, that fact was "of no consequence." 874 F.2d 491, 495 (8th Cir. 1988). A new trial was warranted because "the prosecutor breached her duty to correct the falsehoods." *Id.* The government notes that the "prosecutor compounded [the] witnesses' false testimony … by persuading [the] district court to give" a false answer on a related jury question. BIO.22. But while the court noted that it "need not … ground reversal solely on the basis of the prosecutor's failure to correct the witnesses' false testimony," it held that that failure alone "was prejudicial" and thus warranted a new trial. *Foster*, 874 F.2d at 495.

The government notes that, in the Ninth Circuit's *LaPage* decision, (1) the defense struggled to impeach the false testimony of the government witness, and (2) the government attempted to bolster the credibility of that witness. BIO.22. But, again, these facts did not drive the court's decision. Instead, they merely underscored why "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000); *see also Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) ("It is 'irrelevant' whether the defense knew about the false testimony and failed to object ….").

The state-court cases stand for the same firm principle. While the New Hampshire Supreme Court opined that the "defense's failure to correct [false testimony] did not undermine his claim where [the] 'prosecutor would have likely objected,'" BIO.23 (quoting *State v. Yates*, 629 A.2d 807, 810 (N.H. 1993)), the court followed that statement by holding, "[i]n any event," that "the final responsibility rested with the prosecutor, not Yates, to bring to the attention of the court and the jury" that the state witness's testimony "was probably false." 629 A.2d at 810. And the Michigan Supreme Court's holding "that the prosecution's duty to correct false testimony under *Napue,* 360 U.S. at 269, [need not] be coupled with the separate, though often overlapping, duty to disclose exculpatory information under *Brady*," *People v. Smith*, 870 N.W.2d 299, 306 n.8 (Mich. 2015), stands in stark contrast to the Eleventh Circuit's view that a false testimony claim is "a species of *Brady* error [that] occurs when the *undisclosed* evidence demonstrates

that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." App.18.

Failing to paper over this split, the government argues that the Court should ignore it because, nearly a decade ago, the Court denied a petition that presented a similar claim. BIO.13. But this Court routinely takes up questions it has previously passed on, particularly when a split has deepened. *Compare Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co.*, 134 S. Ct. 1278 (2014) (No. 13-455) (denying petition on issue that divided the circuits 4 to 1) *with Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 137 S. Ct. 2092 (2017) (granting petition on same issue that now divides the circuits 4 to 2). And since the Court declined to review this issue in 2008, the division among lower courts has grown more pronounced and entrenched. *See, e.g.*, App.18-26; *United States v. Vega*, 813 F.3d 386, 391 (1st Cir. 2016); *Soto v. Ryan*, 760 F.3d 947, 968 (9th Cir. 2014); *Smith*, 870 N.W.2d at 299; *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011). It is time for the Court to resolve this broad and enduring "division within the circuits" and state supreme courts. *United States v. Mangual-Garcia*, 505 F.3d 1, 10 (1st Cir. 2007).

II. The Decision Below Is Incompatible With Due Process.

This Court's intervention is further warranted because the Eleventh Circuit's decision contravenes the principle "that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process."

White v. Ragen, 324 U.S. 760, 764 (1945). The court thus has relieved prosecutors of their "constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath," *Trombetta*, 467 U.S. at 485. The government's arguments for excusing the knowing use of false testimony are both unpersuasive and deeply troubling.

Though *Napue* preceded *Brady* by several years, the government disputes the notion that *Napue* imposed any "'separate, wholly independent, and previously recognized duty' to avoid knowing reliance on materially false testimony." BIO.19 (quoting Pet.24). Instead, according to the government, suppression is the key in false testimony cases. Thus, if the government knowingly introduces false testimony against a defendant who "possess[es] all the relevant information, but fails to make use of it, [he] cannot later complain that he did not receive a fair trial." BIO.21. Like the Eleventh Circuit, therefore, the government envisions (indeed, apparently welcomes) a criminal justice system that "treat[s] knowingly perjured testimony as no different from other evidence the defense must debunk and excuse[s] the knowing use of perjury by prosecutors as long as they do not … suppress[] evidence that demonstrates the falsity of the testimony." Pet.16.

This view is irreconcilable with this Court's precedents. When this Court recognized the "principle that a State may not knowingly use false evidence … to obtain a tainted conviction," *Napue*, 360 U.S. at 269, it did not carve out an exemption for prosecutors who disclose documents that arguably

allow a defendant to try to unring the bell of prosecutorial use of perjured testimony. Rather, the Court made clear that the duty is on the prosecutor "to correct what he knows to be false and elicit the truth." *Id.* at 270. And the Court has recognized that disclosure to the defense alone does not satisfy this duty, declaring that *Napue* and *Mooney* "impose upon the prosecution a constitutional obligation to report to [both] the defendant *and to the trial court* whenever government witnesses lie under oath." *Trombetta*, 467 U.S. at 485 (emphasis added) (citing *Napue*, 360 U.S. at 269-72 and *Mooney v. Holohan*, 294 U.S. 103 (1935)). Accordingly, where the government knowingly uses false testimony, a new trial is required unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

Thus, it is of no moment that *Giglio* involved suppressed evidence, for even apart from the suppression, the prosecution had engaged in a "deliberate deception of a court and jurors by the presentation of known false evidence," which by itself is "incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney*, 294 U.S. at 112). And even if there were merit to the government's startling suggestion that "[t]he truthfinding process is better served" by shifting the burden of correcting false testimony from the prosecutor to the defendant, BIO.21; *but see* Pet.24-29, the Constitution demands more. "[F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest

that only irrational or perverse claims of its disregard can be asserted." *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

Tellingly, the best the government can say for the Eleventh Circuit's anything-goes-post-disclosure rule is that the court does not always apply it. Rather, the rule is "relaxed" in certain "extenuating circumstances," such as when a prosecutor "capitaliz[es]" on false testimony or "preclude[s] [the] defendant from exposing [the] false statement during trial." BIO.19 n.5, 21-22. But the government never explains why a prosecutor's initial use of false testimony would be consistent with due process, while his repetition or defense of the falsehood would not. While the latter may compound the error, the former is the error under this Court's precedents and the approach of the Eighth and Ninth Circuits (and multiple state courts of last resort).

III. This Is The Right Case To Resolve The Exceptionally Important Question Presented.

Unable to defend the Eleventh Circuit's decision on its own terms, the government attempts to invent vehicle problems. But these contrived problems are not supported by the decision below or the record. The Eleventh Circuit excused the government's knowing use of materially false testimony because the government did not also suppress evidence of the truth. This case, therefore, is an ideal vehicle for considering whether that rule satisfies the demands of due process.

First, the government takes a snippet of a sentence from the introduction of the Eleventh

Circuit's opinion and tries to stretch it into a factual finding that resolves this case. According to the government, the Eleventh Circuit rejected Stein's claim because he "failed to identify any materially false testimony." BIO.I; *see also* BIO.14 (citing App.2-3). But this supposed finding is non-existent and, indeed, is contradicted by the court's actual findings.

The court of appeals rejected the claims as to Jones' and Woodbury's testimony, not because it found that testimony free from material falsity, but because—under the court's skewed view of due process—the government did not rely on it "in violation of *Giglio*." App.3. When the court analyzed the claims, it recognized that "the allegedly false testimony … contradict[ed]" key documentary evidence. App.26. The court likewise accepted that the testimony was material, expressly noting that "Jones's statement that she received no backup for the purchase orders" was "material." App.26 n.13. But in the court's view, government reliance on such materially false testimony is not "in violation of *Giglio*" unless the government also "withheld [evidence] that would have revealed the falsity of the testimony" or "affirmatively capitalize[d] on" the false testimony. App.3, 19. The court thus rejected Stein's claims, not because he failed to show that the testimony was materially false, but because "Stein offer[ed] no argument that the prosecutor capitalized on the allegedly false testimony …, which he needed to show because none of th[e] evidence [of falsity] was suppressed." App.26.[1]

[1] In contrast, when the court addressed Stein's other false testimony claims, the court repeatedly emphasized that the

The government next argues that neither Jones' nor Woodbury's testimony was false, but all the government offers is a creative reimagining of what they *could* have said. BIO.14-15. Jones and Woodbury both received documentation that substantiated the CHM purchase order that Stein allegedly "made up." Even so, Jones testified that she "never received any backup or anything" for the order, DE241:116-17, and Woodbury—though he received such documentation from the chairman of Signalife's audit committee—claimed that he "got all [his] information" about the order "from Mr. Stein." DE240:96. The government speculates that "Jones may not have considered the email and check to be bona fide 'backup' for the CHM purchase order." BIO.15. And the government indulges in similar conjecture as to Woodbury, proposing that "he may not have viewed" the email and check he received from the audit committee chairman "as independent of the information he received directly from" Stein. *Id.* But what the witnesses *might have* thought or *could have* said does not change the fact that their actual testimony was flatly contradicted by documentary evidence from their files. Both witnesses said there was nothing when the government knew there was in fact something, and there is no getting around that contradiction.

The government fares no better with its assertion that the prosecution would not have considered this

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"argument fails because the government made no material false representations." App.20; *see also* App.20-25. The court thus could not "conclude that the government knowingly relied on materially false testimony." App.25.

testimony to be false because prosecutors knew that Thomas Tribou had denied having a connection with CHM. *Id.* That would not begin to explain how the prosecution could think Jones and Woodbury were telling the truth when they denied receiving documentation—documentation that the prosecution had in its own files—that independently "backed up" the CHM purchase order.

The government contends that, even if it used this false testimony from two of its primary witnesses, there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see* BIO.15-17. This assertion ignores both the record and the Eleventh Circuit's finding that "Jones's statement that she received no backup for the purchase orders" was "material." App.26 n.13. Beyond Jones' and Woodbury's testimony, the government's allegations that Stein "had the company put out fake good news about sales" (DE240:15) turned largely on the testimony of Ajay Anand and Martin Carter, two highly dubious witnesses who had ample motive to support the government's narrative so they could secure favorable plea deals. *See* Pet.8-10, 13-14. Moreover, there was evidence that the company was doing well during the relevant period and that the expansion of its business was being driven, not by Stein, but by its CEO, who actually signed each of the three purchase orders underlying the government's case. *See* Stein.C.A.Op.Br.17; DE453-19:1; App.5-6. The government thus cannot carry the weighty burden of establishing that its use of false testimony was "harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 680.

Finally, the government argues that, because the Eleventh Circuit rejected the aggressive damages theory the government successfully pushed at sentencing, this Court should wait for re-sentencing and another appeal before considering the Eleventh Circuit's lax approach to prosecutorial misconduct. BIO.23-24. But this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). Review is particularly warranted here, where "delay of perhaps a number of years" would "work a great injustice on [Stein]," and the "question[] presented" is "fundamental to the further conduct of the case." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-54 (1964). Indeed, Stein has already served nearly five years in prison based on a conviction secured through the government's knowing use of false testimony. That is five years too many. It is time for this Court to make clear, for once and for all, that such convictions are incompatible with the most basic principles of due process.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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